18-125(L)

18-331 (XAP)

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BOZZUTO'S INC.
Petitioner/Cross-Respondent

V.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF THE DECISION AND ORDER OF THE NATIONAL LARBOR RELATIONS BOARD ON DECEMEBER 12, 2017, CASES 01-CA-115298 and 01-CA-120801

REPLY BRIEF OF PETITIONER/CROSS-RESPONDENT BOZZUTO'S INC

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A. There is Insufficient Causal Connection Between Greichen's Termination for Repeated Refusal to Attend a Work Meeting and Any Claimed Protected Concerted Activity to Preclude the Statutory Proscription Against Reinstatement and Back Pay

The substantial evidence of record establishes that Bozzuto's terminated Patrick Greichen for his repeated refusal to attend a work meeting on October 8, 2013, during work hours while being paid. Refusal to attend a work meeting is not protected activity, and therefore, Greichen was not terminated for engaging in protected activity.

In a doomed attempt to establish that Greichen was somehow justified in refusing to attend the work meeting, the National Labor Relations Board ("Board")[1] falsely found that Greichen did not understand that he would not be disciplined if he attended the meeting. (A008, Note 15). Because Greichen recorded his encounters with his supervisors on October 8, 2013, there can be no question that Bozzuto's told Greichen that he would not suffer any negative consequence from attending the work meeting. The Board cannot satisfy the substantial evidence standard by inventing facts that appear nowhere in the record.

[1] References to the "Board" are to the three-member panel of the NLRB that issued the decision subject to review.

Greichen's recording provides irrefutable evidence of the attempts by Greichen's superiors to convince him to attend the meeting on work standards and keep his job.[2] (A641-A648). As proved by the recording, Bozzuto's made repeated assurances to Greichen that he would not be terminated if he attended the meeting on work standards. (Id.) Greichen acknowledged his understanding as follows:

> Mr. Greichen: Right. Okay. I guess so it's termination if I don't go to the meeting; correct? And its non-termination if I do go to the meeting; right?
>
> Mr. Vaughan: Yeah. You're not going to get terminated upstairs.

(A644). Bozzuto's also provided assurances to Greichen that he would suffer no adverse consequence from attending the meeting on work standards:

> Mr. Vaughan: . . . But I'm telling you now, and I don't want to delay it anymore, but if you absolutely refuse to go upstairs, there is nothing here that's unsafe or discriminatory or harassment in this meeting because we're paying you, you're not going to lose -- you're not going to lose incentive. You're going to get down time away, good stuff, **we're not doing anything negative to you**. If you don't do it, that is considered insubordination.

(A646-A647) (Emphasis added).

Finally, Mr. Greichen confirmed his refusal to attend the meeting:

> Mr. Vaughan: So it's your choice now.

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[2] See also Witness statements regarding Greichen's refusal to attend the work meeting (A611-A618).

> Mr. Greichen: Yeah. My choice is not to go to the meeting.

(Id.).

It is undeniable that Bozzuto's terminated Greichen for cause, specifically insubordination in refusing to attend a work meeting during work hours while being paid. On October 8, 2013, Greichen made accusations to his supervisors and then to Jason Winans ("Winans"), Distribution Manager for Grocery, that management was purposely changing the time standards on a daily basis to "screw" employees and that he tells that to anybody and everybody that he can. (A614, A615; A254; A523-A525). Rick Clark ("Clark"), Senior Vice President of Warehouse and Transportation at Bozzuto's, set up a meeting for Greichen with the industrial engineers to explain to Greichen how the work standards are established so he could see they could not be manipulated on a daily basis. (A125). Greichen testified that, as to the purpose of the meeting at Bozzuto's on October 8, 2013, nothing was said about unions or union organizing. (A522-A523). Rather, Greichen admitted that he was instructed to attend a meeting with Clark and the industrial engineer to discuss work standards. (A518). Greichen admitted that the meeting was to discuss issues he had raised earlier in the day regarding the work standards. (A521, A526).

It is undisputed that Bozzuto's does not change work standards on a daily basis to cheat employees out of incentive compensation. The record establishes that Bozzuto's Industrial Engineers established labor standards using time studies, a

process that took months. (A370). Before any change to labor standards was made, there would be meetings with employees, supervisors, an announcement at shift meetings, and a posting of the work standard on bulletin boards. (A371, A374; A820).

Also undisputed is the fact that Bozzuto's did not terminate Greichen for making false claims on October 8, 2013 regarding Bozzuto's work standards. Instead, the record demonstrates that Bozzuto's arranged for Greichen to meet with its Industrial Engineers to learn that the work standards could not be changed on a daily basis to deny employees incentive compensation. The record established that Bozzuto's Industrial Engineers had met with other employees previously to review labor standards or answer questions about the incentive system, none of whom was terminated. (A367-A369; A247).

Bozzuto's long standing work rules establish insubordination as an offense dischargeable on its first occurrence, (A691, A693), and Bozzuto's has discharged employees for this offense in the past, both before and after the start of union organizing. (A710-A723). Greichen himself acknowledged his obligation to follow reasonable work orders and his awareness of the insubordination rule. (A515-A520).

At the hearing, Greichen dispelled any notion that he was engaged in protected concerted activity when he refused to attend the work meeting on October 8, 2013.

Greichen testified under oath that his reasons for refusing to attend the meeting were that he did not want to hear what management had to say and that he did not want to jeopardize a wage complaint he had filed with the Connecticut Department of Labor in 2013 prior to the start of any union organizing. (A527-A533). Greichen's individual wage complaint to the Connecticut Department of Labor makes no mention of any union or union organizing. (A529, A532-A533, A694-A699). The reasons that Greichen gave under oath for his refusal to attend the meeting on production standards had nothing to do with any protected activity, but were reasons that were personal to Greichen. See Wal-Mart Stores, Inc. and United Food and Commercial Workers Int'l Union, 31 NLRB 130, 141-142 (2007)(Employee's profanity, refusal to attend a meeting, and refusal to provide a statement were not protected activity and justified immediate termination, despite employee's protected activity in requesting to have a witness present during the meeting. "Even absent [employee's] protected activity, Respondent would have terminated him.").

Bozzuto's instruction to Greichen that he attend a meeting during working hours while being paid to learn about Bozzuto's work standards was a reasonable and lawful directive. Indeed, Greichen had participated in many prior similar meetings with management with no adverse consequences and testified that he had no hesitation about meeting with Clark. (A536-A537; A284-A288).

Even more attenuated is the Board's determination that a meeting held with Greichen one week earlier on October 1, 2013, somehow means that he was not terminated for cause on October 8, 2013. Bozzuto's met with Greichen on October 1, 2013, to discuss his negative attitude and disrespectful behavior, which had become disruptive to the work force and work environment. (A857-A858). Greichen had a reputation for getting agitated and could display behavior out of the ordinary. (A284, A287, A308). For example, on August 8, 2013, he was denied a request for additional time off because he had exhausted his allowed time. Greichen responded with a confrontational interaction with his manager, Winans, in which he told Winans that he did not like him or the way he did business. (A658). Clark's assistant told him that Greichen's behavior had become scary, and Clark received comments that Greichen's behavior was erratic. (A119, A122-A123). Greichen himself admitted that he would "rant" about some things, get excited and speak loudly. (A550-A551).

The notes of Doug Vaughan, Manager of Associate Relations and Development at Bozzuto's, summarize the October 1, 2013 meeting as follows:

1. Management needed to address Greichen's conduct because of comments from hourly and salaried workers that Greichen's behavior was more erratic and scary.

2. Clark stated that Bozzuto's has an obligation to provide a safe work environment and that he wanted Greichen to succeed with the company.

3. Clark outlined Greichen's choices, which included appropriate communication with peers and management, no behavior change, and working elsewhere.

4. Greichen commented that when told he was doing something wrong, he felt like he is being poked and forced to the ground. He said he felt like he was being told he was bad and does not like it. He reacts by wanting to get up and do the same things back to the person doing it to him.

5. Clark told Greichen he needed to follow the communication process to appropriate personnel, not making negative comments in the work force without trying to address the issues with management.

6. Clark told Greichen he needed to stop disrupting the work environment by making negative comments in the aisles in front of his peers, such as being forced to work 20 hours per day or needing three legs to do the work. (A857-A858).

Greichen received a verbal warning. Clark never said anything about unions to Greichen at this meeting or otherwise in 2013. (A538).

While Bozzuto's does not contest that Clark's statements to Greichen to the effect that he should first attempt to address issues with management and should not make negative comments in front of his peers violated the National Labor Relations

Act ("Act"), it is undisputed that Greichen was not terminated at the meeting on October 1, 2013. He merely received a verbal warning. There is no evidence in the record that Bozzuto's terminated Greichen's employment because he attended a meeting on October 1, 2013, or on account of anything that occurred on October 1, 2013.

Because Bozzuto's terminated Greichen's employment for cause for not attending a work meeting on October 8, 2013, the Board is statutorily precluded under Section 10(c) of the NLRA from ordering that he be reinstated with back pay. The National Labor Relations Board ("NLRB")[3] claims that Section 10(c) is vague, feigning not to understand the meaning of "discharged for cause." (NLRB Br. at 47). Contrary to the NLRB's argument, Section 10(c) is clear on its face. The statute provides as follows:

> **(c)** Reduction of testimony to writing; findings and orders of Board. . . . If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. . . . If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person

[3] References to the "NLRB" are to the National Labor Relations Board as Respondent/Cross-Petitioner in this matter.

> named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. **No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. . . .**

29 U.S.C. § 160 (c). (Emphasis added).

In claiming not to understand the meaning of "discharged for cause," the NLRB ignores the legislative history of Section 10(c), which makes clear that the statute was intended to preclude the NLRB from ordering reinstatement and backpay to an employee terminated for cause, even if the wrongful conduct resulting in the termination involved an unfair labor practice or protected activity:

> Undesirable concerted activities are not to have any protection under the act, and to the extent that the Board in the past has accorded protection to such activities, the conference agreement makes such protection no longer possible. Furthermore, in Section 10(c) of the amended act, …it is specifically provided that no order of the Board shall require the reinstatement of any individual or the payment to him of back pay if such individual was discharged for cause, and this, of course, applies with equal force whether or not the acts constituting the cause for discharge were committed in connection with a concerted activity.

House Conference Rep. No. 510, 80th Cong. 1st Sess., 39 (1947), U.S. Code Cong. Serv. 1947, pp. 1135, 1146, reprinted in 1 NLRB Legislative History of the Labor Management Relations Act, 1947, at 543 (1948).

Notwithstanding the legislative history of Section 10(c) of the NLRA, the NLRB argues that Section 10(c) should be interpreted to allow the Board to order reinstatement and backpay for any termination, regardless of the employee's misconduct, if the termination in any way involved an unfair labor practice or protected activity. (NLRB Br. at 49). The NLRB's argument in this instance fails for three reasons. First, as demonstrated above, Greichen's termination for insubordination on October 8, 2013 for refusing to attend a work meeting during work hours while being paid was not an unfair labor practice or a termination for concerted activity. Second, assuming arguendo that Greichen engaged in concerted activity by falsely stating that Bozzuto's was changing work standards on a daily basis to "screw" employees out of incentive compensation, he was not terminated for making that comment; he was merely directed to attend a work meeting to learn about the work standards, subject to a promise that no adverse action whatsoever would result if he attended. Thus, the termination for refusal to attend the work meeting was distinct from and separable from any claimed protected activity. Third, the Board's interpretation of the statute is contrary to the statute's plain language, its legislative history, and the overwhelming weight of case law.

Contrary to the NLRB's interpretation, where the employee engages in misconduct that amounts to cause for termination, courts will not allow the remedies of reinstatement or backpay, where the employee was not terminated directly for

engaging in protected activity. See Anheuser-Busch, Inc., 2007 NLRB LEXIS 429, *17, 351 NLRB 644 (2007) (holding that while the employer violated Section 8(a)(5) by installing hidden surveillance cameras which enabled them to detect illegal drug use by means of the illegally installed cameras, Section 10(c) precluded reinstatement and back pay for the discharged employees because their illegal drug use was the "cause" for their discharge.); Taracorp Industries, 1984 NLRB LEXIS 133, *12, 273 NLRB 221 (1984) (refusing make-whole remedy for an employee discharged for insubordination based on information obtained during an investigatory interview, even though the employer obtained the employee's admission that he had refused to obey a work-related order after unlawfully denying the employee's request for a union representative); NLRB v. Local Union 1229, IBEW, 346 U.S. 464, 474 (1953) (Section 10(c) of the NLRA prohibited reinstatement and backpay for employees terminated for distributing leaflets attacking the quality of the company's products, despite the pendency of a labor dispute, finding that insubordination, disobedience, and disloyalty are adequate cause for discharge. The Supreme Court cited the legislative history of Section 10(c) and declared that: "The legal principle that insubordination, disobedience or disloyalty is adequate cause for discharge is plain enough."); Waterbury Community Antenna, Inc. v. NLRB, 587 F. 2d 90, 97 (2d Cir. 1978) ("[T]here is nothing inherently discriminatory or destructive about the discharge of a single employee for

cause, even if that employee is a union activist. It is well established that employees who are active in union affairs do not thereby obtain a special immunity from ordinary employment decisions.").

The cases cited by the NLRB do not support its argument. The NLRB cites Taracorp Industries, 1984 NLRB LEXIS 133, *12, 273 NLRB 221 (1984) and Anheuser-Busch, Inc., 2007 NLRB LEXIS 429, *17, 351 NLRB 644 (2007) in support of its argument; however, those cases held that the remedies of reinstatement and back pay were not available to employees terminated for cause. The NLRB also relies on Fiberboard Paper Products. Corp. v. NLRB, 379 U.S. 203, 204-208, 216-217 (1964); however, that case involved employees who were not terminated for cause. In Fiberboard Paper, the employer made a decision to contract-out maintenance work without engaging in collective bargaining as to that mandatory subject of collective bargaining, resulting in the termination of maintenance employees, who were terminated through no fault of their own. Although the Court found that the Board had authority to order reinstatement, that case did not involve employees who were terminated for cause. Moreover, in Fiberboard Paper, the maintenance employees were terminated directly because of the unlawful contracting-out of maintenance positions. In contrast, Greichen was terminated because he repeatedly refused to attend a work meeting, not because he engaged in any concerted activity.

B. The Board Abused its Discretion by Ordering Notice Reading Where it Cannot Identify Specific Facts in Showing Numerous, Pervasive, and Outrageous Violations of the Act

The NLRB's Brief does not focus on the legal standard that must be met before the extraordinary remedy of notice reading may be ordered because application of that legal standard leads to the inescapable conclusion that the Board abused its authority by ordering notice reading in this case. It is well settled that the Board may only order the extraordinary remedy of notice reading under unusual circumstances in cases in which the unfair labor practices are "numerous, pervasive, and outrageous." Federated Logistics & Operations, 340 NLRB 255, 256-57 (2003), pet. for review denied, 400 F.3d 920 (D.C. Cir. 2005). That legal standard was not met in this case.[4]

The Board's determination fails to recognize the undisputed fact that Bozzuto's is not a repeat violator of the Act. (A036). Further, the Administrative Law Judge Raymond P. Green ("ALJ") found, after an extensive hearing, which included the sworn testimony of Clark and other members of Bozzuto's management, that it was unlikely that Bozzuto's would violate the Act in the future. The NLRB has failed entirely to refute the ALJ's findings. (A036).

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[4] Contrary to the standard of "numerous, pervasive, and outrageous" violations of the Act enunciated in Federated Logistics & Operations, 340 NLRB 255, 256-57 (2003), pet. for review denied, 400 F.3d 920 (D.C. Cir. 2005), the NLRB argues that it may require notice reading where in its judgment, the violations are "sufficiently serious and widespread." (NLRB Br. at 51). The legal standard argued by the NLRB in its Brief is contrary to law.

The ALJ further found that Bozzuto's made an unconditional offer of reinstatement to McCarty on May 14, 2014, including full back pay and the retention of all benefits including seniority, which McCarty rejected. (A037). As a result, the ALJ did not order that McCarty be reinstated or paid back pay beyond May 14, 2014. (A040). The NLRB took no exception to the ALJ's findings in this regard. The ALJ found that on April 9, 2014, Bozzuto's first received evidence that McCarty's production records had been manipulated (A022) and made an unconditional offer of reinstatement to McCarty promptly on May 14, 2014, after completing its investigation. (A022, A037). The NLRB took no exception to the ALJ's findings in this regard. Further, the ALJ found that McCarty had "already decided by May 28 to reject [Bozzuto's] reinstatement offer, but then tried to set up a situation where he could blame the Company for his refusal." (A039). Again, the NLRB took no exception to the ALJ's findings.

The NLRB's arguments do not establish "numerous, pervasive, and outrageous" violations of the Act by citing to McCarty's discharge in view of the undisputed evidence of record that Bozzuto's made a prompt unconditional offer of reinstatement to McCarty, including full back pay and the restoration of all benefits including seniority, which McCarty rejected under false pretenses. (A039). To the contrary, the substantial evidence of record shows good faith on the part of Bozzuto's by promptly offering McCarty unconditional reinstatement, with full back

pay and restoration of all benefits. These are not the type of facts warranting the extraordinary remedy of notice-reading, as properly concluded by the ALJ (A036) and by Board Chairman Miscimarra in his dissent (A017).

Moreover, the Board cannot establish "numerous, pervasive, and outrageous" violations of the Act by pointing to the single question from Clark to McCarty cited by the ALJ in support of the finding of unlawful interrogation: "Hi. Hey, Todd, what is going on with this union stuff." (A327). The ALJ recognized that this solitary comment "might be viewed as an offhand and somewhat innocuous comment." (A034). One admittedly innocuous comment by an employer who has not previously been found to have violated the Act and who has been determined will not likely violate the Act in the future (A036) does not satisfy the legal standard for the extraordinary remedy of notice reading.

Nor is the legal standard satisfied by citing to the termination of Greichen's employment in view of the undisputed evidence of record proving that Bozzuto's made repeated efforts on October 8, 2013 to convince Greichen to attend the work meeting and retain his job. (A644-A648). Bozzuto's demonstrated its good faith by promising Greichen that he would be paid for his time in attending the work meeting and would not suffer any adverse consequence for attending the meeting. (Id.). Bozzuto's actions, as proven by the undisputed record, in making every effort

to convince Greichen to attend the work meeting and keep his job do not constitute outrageous conduct.

Further, while Bozzuto's does not contest that Clark's statements to Greichen on October 1, 2013, to the effect that he was required to first attempt to address issues with management and should not make negative comments in front of his peers violated the Act, it is undisputed that the only discipline suffered by Greichen October 1, 2013 was a verbal warning. Moreover, it is undisputed that the meeting addressed Bozzuto's concerns with Greichen's increasingly erratic and scary behavior as reported by other employees, and at the meeting Bozzuto's reviewed with Greichen its obligation to provide a safe workplace for all employees. (A857-A858).

Likewise, Bozzuto's decision to implement premiums for some categories of employees on October 1, 2013 was not outrageous behavior. The record reflects that Bozzuto's was contemplating wage premiums for employees working in the Freezer, Forklift, Loaders, and late shift employees as early as August 2013, before any union organizing. (A029). Bozzuto's had difficulty recruiting and keeping employees in certain positions, namely assignment to the freezer, and "skilled labor" (forklift and loaders) and shifts beginning after 1 p.m. (A171-A172). The ALJ found that the premium increases constituted a violation of the Act because Bozzuto's meeting minutes did not "clearly reflect" a final decision on the premium increases prior to

the onset of union activities. (A029, Note 1). While Bozzuto's did not challenge the ALJ's determination, Bozzuto's actions in implementing premium increases that were clearly contemplated prior to any union activities is not outrageous conduct.

None of the cases cited by the NLRB contained evidence that: (1) the employer was a first-time violator of the Act; (2) the employer was not likely to violate the Act in the future; (3) one of the two terminated employees had been promptly offered unconditional reinstatement with full back pay and restoration of all benefits; (4) the only other terminated employee had been repeatedly offered the opportunity to retain his job by merely attending a work meeting, subject to a pledge of no adverse action and a promise of full pay and benefits during the meeting time; (5) the meeting on October 1, 2013 with Greichen was called, at least in part, to address legitimate safety concerns and resulted only in a verbal warning; and (6) the ALJ found notice reading unwarranted by the record. Instead, unlike the facts in this matter, all of the cases cited by the NLRB involved numerous, pervasive violations and outrageous conduct.[5]

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[5] See e.g. NLRB v. Homer D. Bronson Co., 273 F. App'x 32, 35, 39-40 (2d Cir. 2008) (notice reading upheld in light of 13 violations of the Act, including multiple mandatory employee meetings at which all employees were threatened with plant closure and employment termination on account of union activities); Federated Logistics & Operations v. NLRB, 400 F.3d 920, 922-923, 939 (D.C. Cir. 2005) (notice reading upheld where employer engaged in numerous violations of the Act, including: soliciting an employee to report on union activities; promising employees unspecified benefits if they defeated the union; threatening employees with wage freezes and with loss of benefits if they elected the union; withholding a wage increase because of employee involvement with the union; and disciplining employees for union activities.); Conair Corp. v. NLRB, 721 F.2d 1355, 1386-1387 (D.C. Cir. 1983) (notice reading by company president upheld in "egregious circumstances" where the company president: (1) repeatedly threatened all

The Board's order in this case requires notice reading by Clark, Bozzuto's highest-ranking manager, at a time when the most possible employees may be present, or by a Board agent in Clark's presence. (A010). The Board's order would result in the humiliation of Clark before Bozzuto's assembled employees by either method. The Board ordered the notice reading in addition to, and not in lieu of, its requirement that Bozzuto's sign and post the notice for 60 consecutive days in conspicuous places at Bozzuto's facility, including all places where employee notices are customarily posted. (A010).

The Board in this case has failed to articulate the specific circumstances in this record which establish that Bozzuto's violations were "numerous, pervasive, and outrageous" violations of the Act or that Clark, in particular, should be subjected to public humiliation. See Teamsters Local 115 v. NLRB (Haddon House), 640 F.2d 392 (D.C. Cir. 1981) (refusing to enforce the Board's order that the president of the company read the notice because of the failure or the Board to demonstrate "the particularized need" for such an *ad hominum* remedy.) cited with approval in Conair

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employees in mandatory meetings that he would shut the plant down and move it to Hong Kong if a union was elected; (2) threatened employees with withdrawal of Christmas parties, loss of employee profit sharing, and withdrawal of Christmas bonuses if a union was elected; (3) promised many benefits if the union was defeated; (4) committed himself to a "crusade" of "systematically promoting fear and promising improvements; and (5) where many other company officials issued a barrage of unlawful threats and promises in unlawful mandatory employee meetings.); UNF West, Inc. v. NLRB 844 F.3d 451 (5th Cir. 2016)(notice reading upheld because of "incontrovertible" evidence that the employer was a repeat violator of the NLRA, making the same threats to reduce benefits and engaging in the same coercive interrogations adjudicated to be unlawful in the prior union campaign in the same facility two years earlier).

Corp. v. NLRB, 721 F.2d 1355, 1385-1386 (D.C. Cir. 1983); Federated Logistics & Operations, 340 NLRB 255, 256-57 (2003), pet. for review denied, 400 F.3d 920 (D.C. Cir. 2005). It is not enough for the NLRB to attempt to justify notice reading by or in the presence of Clark by citing to cases where numerous, pervasive and outrageous violations were found; the NLRB has failed to identify specific conduct in this case by Bozzuto's generally, or Clark in particular, which meet the high standard for the extraordinary remedy of notice reading. The NLRB is unable to identify such circumstances in this case because the substantial evidence of record is directly contrary. Accordingly, the Board's attempt to impose notice reading as a remedy on the facts of this case is an abuse of discretion, as is the Board's attempt to humiliate Clark in particular.

Ordering notice reading under the facts of this case would amount to reversal of decades of judicial precedent and create new rule that every employer that commits any violations of the Act, even if a first offense and notwithstanding its good faith, will be humiliated before its workforce by being required to read a notice of violation in the presence of its assembled employees, regardless the Board's inability to identify specific facts demonstrating the existence of numerous, pervasive, and outrageous violations of the Act. It would not serve the interests of the Act to create a new rule that notice reading may be ordered in the absence of numerous, pervasive and outrageous violations of the Act. Creation of such a rule

would impose unnecessary humiliation on business owners for no justifiable cause, which would not serve any legitimate purpose behind the Act, lest Congress decide to change the purposes of the Act to include the gratuitous humiliation of companies and individual managers in the presence of their assembled employees.

C. The Board Failed to Demonstrate that the Totality of the Circumstances Support a Finding of Unlawful Interrogation

It is undisputed that the ALJ's finding of unlawful interrogation of McCarty was based on a solitary question from Clark to McCarty in the warehouse work area: "Hi. Hey, Todd, what's going on with this union stuff?" (A327).

The NLRB does not dispute that the controlling factors for determining whether unlawful interrogation exists were enunciated by this Court in Bourne v. NLRB, 332 F.2d 47, 48 (2d Cir. 1964). (See NLRB Br. at 21). Despite the NLRB's arguments, application of the governing legal standard leads to the inescapable conclusion that no unlawful interrogation occurred in this case.

First, there is no history of anti-union hostility or discrimination at Bozzuto's. To the contrary, the ALJ found that it had not been shown that Bozzuto's had violated the Act in the past or that it would likely violate the Act in the future. (A036). It is undisputed that Clark did not communicate any threat to McCarty. Additionally, prior to September 27, 2013, the date the NLRB alleged Clark asked McCarty this question, there is no evidence that Bozzuto's had voiced any opposition to the union.

The NLRB argues that Bozzuto's termination of Greichen for events occurring on October 8, 2013, subsequent to Clark's solitary statement to McCarty, somehow converts Clark's prior solitary statement into an unlawful interrogation. (See NLRB Br. at 23). As demonstrated above, Bozzuto's terminated Greichen for his repeated refusal to attend a work meeting during work hours while being paid, despite Bozzuto's assurances that no adverse consequence would result if he attended the meeting. (A644-A649). Bozzuto's undisputed efforts to convince Greichen to attend the work meeting and keep his job evidences its good faith, not hostility against unions or discrimination. It is further undisputed that Bozzuto's never mentioned anything about unions to Greichen on October 1 or October 8, 2013. (A538, A521, A526). The NLRB's attempt to demonstrate a history of employer hostility to unions and discrimination by citing to Bozzuto's efforts to convince Greichen to attend a work meeting on October 8, 2013 and retain his employment is completely unavailing. Nor can Clark's solitary comment to McCarty be retroactively converted to an unlawful interrogation by citing to the implementation of premium increases for some employees, which had been under consideration by Bozzuto's as early as August 2013, prior to any union organizing. (A029, Note 1; A171-A172).

The cases relied upon by the NLRB involved histories of anti-union hostility and discrimination, not present in the case of Bozzuto's, and do not support the NLRB's argument.[6] Thus, the first Bourne factor weighs in favor of Bozzuto's.

The second Bourne factor focuses on the nature of the information sought, e.g., did the interrogator appear to be seeking information on which to base taking action against individual employees. The undisputed facts show that McCarty responded to Clark's inquiry by saying, "I'm not going to talk about it with you, Mr. Clark" and noting further was said by Clark. (A327). The NLRB does not argue that Clark's single, brief question was directed at discovering information about any particular individual that could have been used to take action against supporters of the union. Nor could the NLRB make such an argument based on the general, innocuous nature of Clark's solitary question: "Hi. Hey, Todd, what's going on with this union stuff?" (A327). The fact that Clark made no follow-up inquiry and made no attempt to discover information about specific employees shows the non-coercive

[6] See NLRB v. Camco, 340 F.2d 803, 805-808 (5th Cir. 1965)(unlawful interrogation found because of extensive interrogations and threats of plant closure and terminations communicated to every employee of company and the discharge of eleven active union supporters, where interrogations sought to identify union supporters and included repeated threats that those meeting with the union would be terminated.); Medical Center of Ocean County and International Union of Operating Engineers, Local 68-A, AFL-CIO, 315 NLRB 1150, 1154-1155 (1994) (unlawful interrogation found where interrogations conducted in the manager's office with the door closed included threats that support for the union could result in loss of pension benefits.); Westwood Health Care Center, a Division of Medcare Associates, Inc. and Professional & Technical Health Care Union, Local 113, SEIU, 330 NLRB 935, 941-942 (2000) (unlawful interrogation found against a background of hostility and unlawful conduct, including forbidding employees from engaging in union activities and implying that any employees who supported the union were disloyal.).

nature of the encounter. Thus, the second Bourne factor weighs in favor of Bozzuto's.

Clark's high-level position is a factor which weighs in favor of the NLRB under the Bourne criteria. However, this third Bourne factor is mitigated by the undisputed fact that Clark and McCarty had a good relationship, which would tend to show an absence of coercion. (A012, A006, Note 6).

The fourth Bourne factor focuses on the place and method of interrogation, e.g. was employee called from work to the boss's office and was there an atmosphere of 'unnatural formality'? It is undisputed that the exchange between Clark and McCarty occurred at a chance meeting on the warehouse floor. (A327). McCarty was not questioned in a private office with the door closed. There was no "unnatural formality". The NLRB makes no argument to the contrary. Accordingly, the fourth Bourne factor unquestionably weighs in favor of Bozzuto's.

The fifth Bourne factor judges whether the employee's reply was truthful, an untruthful or deceptive response being indicative of coercion. In response to Clark's single, "offhand and somewhat innocuous comment," McCarty made no attempt to conceal his support for the union and responded: "I am not going to talk about it with you, Mr. Clark." (Id.). There were no follow up questions after McCarty dismissed Clark's remark. (Id.). There was nothing untruthful about McCarty's response. McCarty did not falsely deny the existence of a union campaign. He was not

deceptive. The fact that McCarty felt comfortable enough to simply decline to discuss the union demonstrates the absence of coercion.[7]

Because four of the five factors that must be applied to determine if unlawful interrogation occurred weigh in favor of Bozzuto's, the totality of circumstances demonstrates that Clark's solitary question to McCarty does not amount to unlawful interrogation, and the Board's determination to the contrary is arbitrary and capricious. The Board could only reach its incorrect conclusion by arbitrarily declining to apply the governing legal standard.

Unable to show unlawful interrogation under the Bourne criteria, the NLRB argues that Clark's solitary inquiry was somehow converted into an unlawful interrogation because McCarty's union activity was allegedly unknown. That argument makes no sense in view of McCarty's sworn testimony that within the first week of the union campaign he was open about his support for the union. (A489). McCarty would be in the best position to know that he was open about his support

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[7] The facts of cases relied upon by the NLRB differ greatly from Clark's solitary inquiry to McCarty. See Tellepsen Pipeline Servs. Co. v. NLRB, 320 F.3d 554, 561 (5th Cir. 2003)(employer engaged in multiple interrogations during which employees were repeatedly threatened that the company president would shut down the plant in the event of unionization; Town & Country Supermarkets, 340 NLRB 1410, 1423-1424 (2004)(multiple interrogations made against a backdrop of "abundant evidence" of union hostility including threats against all employees of economic reprisals if a union was elected); Chipotle Services, LLC, 2015 NLRB LEXIS 817, *54-62 (2015)(multiple coercive interrogations during which employees were told they: (1) could not talk about wages; (2) would be subject to discharge or unspecified reprisals for talking about wages; and (3) were instructed to report any employee discussing wages to management).

for the union. The fact that Clark asked McCarty what was going on with this union stuff, supports McCarty's sworn testimony that he was being open about his union activity within the first week of the union campaign. The NLRB cannot demonstrate that the Board's finding that McCarty's union activity was unknown (NLRB Br. at 22) is substantially supported by the record by contradicting the sworn testimony of McCarty, the person in the best position to know when he was open about his support for the union. The Board's reliance on Ozburn-Hessey Logistics, LLC, 357 NLRB 1456, 1488-89 (2011) for the proposition that questioning an employee whose union activity is unknown establishes coercive interrogation, is misplaced. The actual holding in Ozburn-Hessey was that the employer committed multiple unfair labor practices by making threats and denying overtime to union supporters, interrogating employees about union activities, interrogating employees about their union sympathies, and soliciting employees to persuade others to abandon their support for the union. Id. at 1508. The interrogations present in Ozburn-Hessey bear no resemblance to Clark's solitary comment to McCarty.

D. The Board has failed to Demonstrate that Bozzuto's Acted with Discriminatory Intent in Terminating McCarty's Employment

Contrary to the NLRB's arguments, the record shows that McCarty withheld information from Bozzuto's that would have avoided any discipline. It is undisputed that McCarty had within his possession photographic evidence demonstrating that he met the production requirements (A339-A341) and elected to withhold this

evidence from Bozzuto's so that he was terminated in accordance with Bozzuto's policy on production deficiency discipline. (A446; A563).[8]

Also contrary to the NRLB's argument, Bozzuto's was unable to conclusively establish who made the changes to McCarty's records because security at that time was lax - the supervisor codes were short and never expired, and once a log in occurred, the system would remain open and active indefinitely. The investigation also revealed that some supervisors shared their codes with employees. (A383; A247). Once a screen had been altered, only the altered screen remained viewable on the system. Thus, if someone looked up prior production data, he would only find the altered screen. Only the review of hundreds of pages of detailed individual transaction logs revealed the changes. (A385-A387).

McCarty testified that prior to 2014, if he brought compensation discrepancies to Bozzuto's attention with his evidence, Bozzuto's would correct the discrepancy (A442). McCarty consulted with union representative Dokla about the issue of when to disclose his photographic evidence that he met production standards. (A508; A677). At that point in time, January 2014, the union organizing drive had "gone cold," with only six (6) cards signed in December and three (3) cards signed in

[8] The NLRB erroneously argues that Bozzuto's did not challenge the Board's determination that Bozzuto's unlawfully suspended McCarty pending investigation. (NLRB Br. at 30). To the contrary, Bozzuto's necessarily challenged the Board's determination of unlawful suspension pending investigation because suspension pending investigation of production deficiency, and termination for production deficiency, were undertaken for the same non-discriminatory reasons and were part of the same action.

January. McCarty recognized that the organizing campaign needed to be invigorated. (A459, A475). McCarty elected not to disclose the evidence that he was meeting production standards to Bozzuto's. (A441-A446; A307-A308).

McCarty testified that he furnished the screen photographs to the NLRB attorney in mid-late January, 2014. (A453). The NLRB did not advise Bozzuto's that McCarty's production data had been tampered with or provide the "before and after" photographs until April 9, 2014. (A662). This was the first time that Bozzuto's was notified of the tampering allegation and presented with this evidence. The notice that was too late to review security cameras to determine who made the modifications. (A156; A563).

Once Bozzuto's was given the evidence by the NLRB agent in April 2014 (A662), two months after McCarty's discharge, Bozzuto's promptly reviewed hundreds of individual transaction logs to conclude that McCarty's production records had been tampered with and offered McCarty unconditional reinstatement. (A687).

Bozzuto's unconditional offer of reinstatement to McCarty provided for immediate unconditional reinstatement to the same job, with the same seniority, same benefits, and the same pay rate that McCarty would have held had there been no interruption in his employment, and make whole relief for any losses, earnings and other benefits incurred as a result of the discharge. (A687).

The offer of unconditional reinstatement further stated that McCarty was not required to sign any settlement agreement or release any claims or withdraw any pending complaints. (A687). Further, McCarty was advised that he could accept the unconditional offer of reinstatement and continue to pursue any legal claim or complaints against Bozzuto's, including but not limited to, his claim with the NLRB and his civil action in the Connecticut Superior Court. (Id.).

Given Bozzuto's prompt investigation and reinstatement offer to McCarty once the relevant evidence had been supplied, the only reasonable conclusion is that McCarty would not have been disciplined or discharged if McCarty had provided his correct production records in January 2014, and that his union activity made no difference.

The record shows that in the year prior to McCarty's termination, twelve (12) other employees were terminated for low productivity, including eleven (11) terminations prior to the onset of union organizing. (See A724-A768). Bozzuto's applied its customary work rules in terminating McCarty for low productivity. Contrary to the NLRB's argument, the substantial evidence of record does not support the conclusion that Bozzuto's acted with discriminatory intent toward McCarty.

Respectfully Submitted:

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief contains 6,975 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word in 14-point font size and Times New Roman.

/s/
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September 14, 2018

CERTIFICATION OF SERVICE

In accordance with Fed. R. App P. 25 and Local Rule 25.1, I hereby certify that on September 14, 2018: (a) the foregoing document was filed with the Second Circuit through the CM/ECF system; (b) Respondent's counsel has filed an appearance and is a registered CM/ECF user in this case and service of the foregoing document will be made through the CM/ECF system; and that (c) a courtesy copy of the foregoing document has been sent via e-mail to Respondent's counsel: Linda Dreeben (appellatecourt@nlrb.gov), Julie Brock Broido (julie.broido@nlrb.gov) and David A Seid (dseid@nlrb.gov).

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